86-1178

Supreme Court, U.S.
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NO. _____

UNITED STATES SUPREME COURT

October Term, 1986

CLAY W. DIPPEL,	)	
	)	Missouri Supreme Court
Pltf.-App.,	)	Cause No. 63638
	)	Missouri Court of Appeals,
vs.	)	Eastern District,
	)	Appellate No. 50279
TACO BELL CORP.,	)	Circuit Court, City of St. Louis
	)	Cause No. 812-09572
Def.-Resp.	)	

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

APPELLANT'S JURISDICTIONAL STATEMENT

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In The

UNITED STATES SUPREME COURT

CLAY W. DIPPEL,	United States Supreme Court
	Cause No. _____
Pltf.-App.,	Missouri Supreme Court
	Cause No. 63638
vs.	Missouri Court of Appeals,
	Eastern District,
TACO BELL CORP.,	Appellate No. 50279
	Circuit Court, City of St.
Def.-Resp.	Louis, Cause No. 812-09572
	October Term, 1986

JURISDICTIONAL STATEMENT

(a) Questions Presented

1. Did Plaintiff have a "vested right" in a punitive damages award after a unanimous jury verdict and entry of judgment?

2. May an amendment to a statute be applied retroactively without express intention of the legislature after case law established for 3 years that this statutory amendment was not retroactive?

3. Is Missouri Service Letter Statute, Section 290.140, R.S.Mo. 1982, as applied, in violation of the 14th Amendment due process clause, and thereby unconstitutional, when the Missouri Supreme Court reverses itself?

(b) List of Parties

The original Plaintiff, Clay W. Dippel, and the original Defendant, Taco Bell, are still the same in the suit. Since 28 U.S.C. Section 2403(b) may be applicable, service shall be made on the attorney general of the State of Missouri.

(c) Table of Contents and Table of Authorities

Table of Contents

	Page
(a) Questions Presented	1
(b) List of Parties	2
(c) Table of Contents and Table of Authorities	2 3
(d) Reference to Opinions Delivered in the Courts Below	5
(e) Statement of Grounds of Jurisdiction	5
(f) Constitutional Provisions and Statutes Involved	6
(g) Statement of the Case	7
(h) Why So Substantial As to Require Plenary Consideration	13
(i) Not from a Decree of a District Court	
(j) Appendix	24

Table of Authorities [Page numbers in brackets]

American States Water Service Co. of Calif. vs. Johnson, 3 Cal.App. 2d 606; 88 Pd. 770, 774 (1939). [16]

Arie v. Intertherm, Inc., 648 S.W.2d 142; (Mo.App.1983). [16, 17, 21]

Arnold v. City of Sherman, 224 S.W.2d 880 (1951). [14, 15]

Bank of St. Mary's v. State, 12 Ga. 475 (1853). [14]

Barr v. Preskett, 389 F. Supp. 496 (E.D.Ala.1975). [23]

Beecher, et al v. Department of Transportation, 151 Ga.App. 355; 259 S.E.2d 638 (1979) [15, 22, 23]

Black's Law Dictionary, 5th Edition (1979). [16]

Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo.App.1985). [17, 20]

Brown v. Indemnity Insurance Co. of North America, (La.App.2nd Cir. 1959); 908 So. 2nd 812. [19]

Comerio v. Beatrice Foods Co., 595 F.Supp. 918 (E.D.Mo.1984) [17, 20]

Dept. of Transportation v. Kindrichs, 150 Ga.App. 9 (1979); 256 S.E.2d 610. [22]

Forbes Pioneer Boat Line v. Everglades Drainage District, 258 U.S. 338; 42 S.Ct. 325; 66 L.Ed. 647 (1922) [23]

Gibbes v. Zimmerman, 290 U.S. 326; 54 S.Ct. 140; 78 L.Ed. 342 (1933). [23]

Graham v. Goodwell, 282 U.S. 409; 51 S.Ct. 186; 75 L.Ed. 415 (1930). [23]

Harden v. United States, 688 F.2d 1025; (5th Cir. 1982). [15, 21]

Hooter v. Wilson, La. App. Ct. 1972; 256 So.2d 808. [15]

Housing Authority v. Southern R. Co., 150 Ga. App. 4; 256 S.E.2d 606 (1979) [22]

Hutton v. Autoridad Sobre Hogares De La Capital, 78 F.Supp. 988; (D.P.R.1948). [14]

Kelly v. Hall, et al, 12 S.E.2d 881 (Ga.1941). [14, 15]

Musselman v. Anheuser Busch, Inc., 657 S.W.2d 282 (Mo.App.1983). [21]

Protection Mutual Ins. Co. v. Kansas City, 515 S.W.2d 909, 912 (Mo.App.1977). [18,20]

Scheidegger v. Greene, 451 S.W.2d 135 (Mo.1970). [19]

Smith v. Hill, 12 Ill.2d 588; 147 N.E.2d 321, 877; 73 ALR 2d 540 (1958). [13, 15]

State ex rel Deering v. Corcoran, 652 S.W.2d 228 (Mo.App.1983). [16, 17, 20, 27]

State ex rel. St. Louis-San Francisco Railway v. Buder, 515 S.W.2d 409 (Mo.banc 1974). [21]

Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656 (Mo.banc 1986). [5, 12, 17, 25, 26, 27, 35]

Mo. Const., Art. I, Sec. 13 (1945). [6, 19, 21]

Mo. Ann. Stat., Sec. 290.140 (Vernon 1982). [1, 7, 10, 11, 16, 20, 21, 25]

Mo. Ann. Stat., Sec. 1.170 (Vernon 1957). [8, 20]

Mo. Ann Stat., Sec. 1.180 (Vernon 1957). [9, 20]

U.S.C.A. Const.Amend. 14 Sec. 1 [1, 9, 23]

28 U.S.C., Sec. 1257(2) (1970). [6, 9]

28 U.S.C., Sec. 2101(c) (1948). [5, 10]

(d) Reference to Opinions Delivered In The Court

The case was filed in the Circuit Court of the City of St. Louis, Cause No. 812-09572. The final amended judgment was entered on June 10, 1985. Appeal was made to the Missouri Court of Appeals, Eastern District, Appellate No. 50279. Opinion was filed on July 22, 1986. Transfer to the Missouri Supreme Court was denied on October 14, 1986, based upon the decision in Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656 (Mo.banc 1986).

(e) Statement of Grounds of Jurisdiction

The Supreme Court of Missouri denied transfer to the action on October 14, 1986. The Notice of Appeal was filed January 9, 1987. It was filed in the Supreme Court of Missouri, and the Missouri Court of Appeals, Eastern District. This appeal is filed within the time limits specified in 28 U.S.C. Section 2101(c). In this case, a statute of Missouri

has been applied in violation of the 14th Amendment of the United States Constitution. Therefore, the Court is granted jurisdiction under 28 U.S.C. Section 1257(2).

(f) Constitutional Provisions and Statutes Involved

Mo. Const., Art. I, Sec. 13 (1945)

"13. **Ex post facto laws--impairment of contracts--irrevocable privileges**

Section 13. That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

Mo. Ann. Stat. Sec. 290.140 (Vernon 1982)

"290.140. **Letter of dismissal, when--failure to issue, damages--punitive damages, limitations**

1. Whenever any employee of any corporation doing business in this state and which employs seven or more employees, who shall have been in the service of said corporation for a period of at least ninety days, shall be discharged or voluntarily quit the service of such corporation and who thereafter within a reasonable period of time, but not later than one year following the date the employee was discharged or voluntarily quit, requests in writing by certified mail to the superintendent, manager or registered agent of said corporation, with specific

reference to the statute, it shall be the duty of the superintendent or manager of said corporation to issue to such employee, within forty-five days after the receipt of such request, a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service.

2. Any corporation which violates the provisions of subsection 1 of this section shall be liable for compensatory but not punitive damages but in the event that the evidence establishes that the employer did not issue the requested letter, said employer may be liable for nominal and punitive damages; but no award of punitive damages under this section shall be based upon the content of any such letter.
(Amended by L. 1982, p. 511, par. 1.)

1982 Amendment. Divided the section into subsecs. 1 and 2; in subsec. 1 inserted "and which employs seven or more employees, who shall have been in the service of said corporation for a period of at least ninety days" following "this state", insreted "and who thereafter within a reasonable period of time, but not later than one year following the date the employee was discharged or voluntarily quit, requests in writing by certified mail to the superintendent, manager or registered agent of said corporation with specific reference to the statute" following "such corporation", deleted "for a period of at least ninety days" following "said corporation", inserted "within forty-five days after the receipt of such request" following "such employee", substituted "was discharged or voluntarily quit such service" for "as quit such service; and if any such superintendent or manager shall fail or refuse to issue such

letter to such employee when so requested by such employee, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment"; added subsec. 2."

Mo. Ann. Stat. Sec. 1.170 (Vernon 1957)

"1.170. Repeal of law not to affect rights acquired thereunder

The repeal of any statutory provision does not affect any act done or right accrued or established in any proceeding, suit or prosecution, had or commenced in any civil case previous to the time when the repeal takes effect; but every such act, right and proceeding remains as valid and effectual as if the provisions so repealed had remained in force. (R.S.1939, par. 660, as amended L. 1957 p. 587 par. 1)"

Mo. Ann. Stat. Sec. 1.180 (Vernon 1957)

"1.180. Actions pending, how affected by repeal of law

No action or plea, pending at the time any statutory provisions are repealed, shall be affected by the repeal; but the same shall proceed, in all respects, as if the statutory provisions had not been repealed, except that all proceedings had after the repeal becomes effective are governed by procedural rules and laws then in effect, insofar as they are applicable. (R.S.1939, Sec. 662, as amended L.1957 p. 587 Sec. 1)"

U.S.C.A. Const.Amend.14 Sec. 1

AMENDMENT XIV.

"1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Sec. 1257(2) (1970)

"1257. State courts; appeal; ceriorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

28 U.S.C. Sec. 2101(c) (1948)

"2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within

ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

(g) Statement of the Case

The Plaintiff, Clay W. Dippel, was in the employ of Defendant, Taco Bell. The Plaintiff was then fired from Taco Bell in July, 1981. On August 5, 1981 Ray A. Gerritzen, attorney for Plaintiff, sent a letter to Taco Bell quoting from and specifically referring to Missouri Service Letter Statute, Section 290.140 RSMo 1982. The letter was received by Taco Bell and answered by Mr. Andrew Banks, attorney for Taco Bell, on August 25, 1981. Bank's letter said Taco Bell fired Dippel because "it was in the best interest of the company". On August 31, 1981, Ray A. Gerritzen replied with another letter to Banks specifically advising that Banks' letter did not comply with the Missouri Service Letter Statute which specified that the company state truthfully for what cause, if any, Dippel was terminated. Mr. Banks then sent his reply

letter of September 4, 1981 stating the company will be providing no further information.

Plaintiff, Clay W. Dippel, filed suit against Defendants Taco Bell and its regional manager, Ron Ayala, on September 25, 1981. Missouri Service Letter Statute Section 290.140 RSMo. 1978, was amended August 13, 1982. In 1983, it was judicially held the amendment to Missouri service letter statute Section 290.140 RSMo. 1982, would not be applied retroactively to bar a punitive damage award in a suit commenced prior to the effective date of the amendment.

Dippel filed suit on September 18, 1981 and on May 15, 1985, in the Circuit Court of the City of St. Louis, verdict and judgment was awarded to Plaintiff in the amount of $10,000.00 actual damages plus $50,000.00 punitive damages, with interest thereon as provided by law. Upon Taco Bell's subsequent Motion for Judgment Notwithstanding the Verdict Or, In the Alternative, to Amend the Judgment, the trial court, Judge Michael M.

Godfrey, reduced the actual damages of $10,000.00 to $1.00 nominal damages, but did not disturb the $50,000.00 punitive damages award to Plaintiff. That final amended judgment was entered on June 10, 1985. Notice of Appeal was filed by Taco Bell to the Missouri court of Appeals, Eastern District, on June 17, 1985.

After written briefs were filed and oral argument held in Dippel, the Missouri Supreme Court in Vaughan v. Taft Broadcasting Co., 708 S.W. 2d 656, on April 15, 1986, reversing earlier decisions, which held that punitive damages were recoverable if the service letter suit was filed prior to August 13, 1982. The question of retroactivity of the 1982 Amendment was not raised by Taco Bell in its post-trial motion, brief, or oral argument. It was first raised by Taco Bell's attorney's letter of May 27, 1986 to the Missouri Court of Appeals, enclosing a copy of the Missouri Supreme Court Vaughan opinion. On July 22, 1986, the Missouri Court of Appeals, Eastern District, affirmed the judgment of nominal

damages but reversed the judgment for punitive damages, relying upon the Vaughan decision. Dippel then timely applied for Transfer to the Missouri Supreme Court but was denied by the Missouri Supreme Court on October 14, 1986.

(h) Why so substantial as to require plenary consideration

The questions presented are so substantial as to require plenary consideration because:

1. The Missouri Supreme Court is going against the weight of authority throughout numerous jurisdictions in holding that a punitive damage award after judgment is not a "vested right".

Punitive damages are generally held not to be a private right of an individual. They are not to recompense the individual solely, but rather, they are allowed in the interest of society to deter similar conduct in the future. Smith v. Hill, 12 Ill. 2d 588, 147; N.E. 2d 321, 877, 73 ALR 2d 540 (1958). One who suffers an injury is entitled to a cause of action for actual damages, but a vested right to punitive damages arise only where a judgment has been allowed by a judgment in

in the interest of society or as a penalty.

There is numerous authority stating that a judgment is a "vested right". Some cases use this reasoning to deny recovery stating that a judgment hasn't been entered yet so there is no "vested right". Harden v. United States, 688 F. 2d 1025 (5th Cir., 1982). Beecher, et al v. Department of Transportation, 151 Ga. App. 355, 259 S.E. 2d 638 (1979). Kelly, supra; Smith, supra. There is authority also that use this rationale to uphold awards given in a judgment from being altered by retrospective application of a statute. Hooter v. Wilson, 256 S.W. 2d 808 (La.App.1972); Arnold, supra.

Black's law dictionary, 5th Edition (1979) defines "vested rights" in part:

> "In constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.

> Such interests as cannot be interfered with by retrospective laws; interests which it is proper for state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice. American States Water Service Co. of California v. Johnson, 3 Cal.App.2d 606, 88 P.2d 770, 774."

In the present case, Plaintiff was awarded a judgment "according to the then current rules of law." In Arie v. Intertherm, Inc., 648 S.W. 2d 142 (Mo.App.1983), it was held that a punitive damage award in a case under the Missouri Service Letter Statute, Section 290.140 RSMo., 1982, after entry of a judgment, was a "vested right" which could not be taken away constitutionally by retroactive application of an amended statute. This was a judgment which was entered before the effective date of the amendment. But in State ex rel Deering v. Corcoran, 652 S.W.2d 228 (Mo.App.1983), it was held that the August 13, 1982 amendment to the service letter statute, precluding punitive damages did not apply to suits pending before the effective date of the amendment. Plaintiff in the case at bar filed suit September 18, 1981. This interpretation of the statutory amendment was followed by the

federal courts. Comerio v. Beatrice Foods Co., 595 F. Supp. 918 (E.D.Mo.1984). On May 15, 1985, judgment was entered for Plaintiff that included punitive damages. In November, 1985, the Missouri Court of Appeals, Western District affirmed the holding in Deering. Boyle v. Vista Eyewear, Inc., 700 S.W. 2d 859 (Mo.App.1985). Deering and Arie were both appellate court decisions, but in both cases, application to transfer to the Missouri Supreme Court were denied. Accordingly, in the case at bar, Plaintiff had a judgment awarding punitive damages "according to the then current rules of law." Applying the overwhelming authority available then, Plaintiff had a "vested right" in his punitive damage award after judgment.

The Missouri Court of Appeals took away Plaintiff's "vested right" in his punitive damage award, citing Vaughan, supra, 11 months after judgment had been entered. In following, the Supreme Court of Missouri has a position contrary to the weight of authority with regard to the presence of a "vested

right" after judgment. Due to the importance of "vested rights", the clarity that is needed concerning what is a "vested right", and the disagreement between the jurisdictions with relation to "vested rights", review by the Supreme Court of the United States is imperative.

2. There is agreement among the various jurisdictions as to the general principle for the retroactive application of statutes. But there seems to be a confusion among the jurisdictions distinguishing remedies and procedure from substantive rights. Therefore, decisions are unsettled in various states. As a consequence, review by the United States Supreme Court with a clearer holding of when a statute should be applied retroactively is necessary.

The general principles governing retroactive application seem relatively settled. A general presumption prevails that statutes should not be given retroactive effect. Protection Mutual Insurance Co. v. Kansas City, 515 S.W. 2d 909, 912

(Mo.App.1977). In Brown v. Indemnity Insurance Co. of North America, 908 So. 2d 812 (La.App.2nd Cir. 1959), the court stated:

> "Notwithstanding the general rule that statutes are construed to operate prospectively only, in the absence of a clear legislative interest to the contrary, statutes relating only to remedies or works of procedure are generally held to operate retrospectively (unless such application would adversely affect substantive rights.)"

This same rationale, absent the portion of "adversely affecting substantive rights" is found in cases concerning Art. I, Sec. 13 of the Missouri Constitution (1945). Scheidegger v. Greene, 451 S.W. 2d 135 (Mo.1970), held "under Art. I, Sec. 13 of the Missouri Constitution, no statute retrospective in its operation can be enacted . . . No person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights, and where a new statute only deals with procedure it applies to all actions including those pending or filed in the future."

All previous opinions concerning the Missouri Service Letter Statute held that it

wasn't the intention of the legislature to retroactively apply the amendment, and therefore, held it was not retroactive. Corcoran, supra, and Boyle, supra. The basis of not applying the amendment was the Missouri General Savings Statutes, Mo. Ann. Stat. Sec. 1.170 (1957) and Mo. Ann. Stat. Sec. 1.180 (1957). In Protection Mutual Insurance Co., supra, the court held:

> "Whenever the legislature repeals an existing statute it is considered to have done so in contemplation of the general savings clause as in Section 1.170 and 1.180, and unless the legislature specifically makes the re-enacted statutes retroactive, it is presumed that the savings clauses hereinabove stated are to be incorporated by reference with the same effect as if the repealing statute contained its own special savings clause."

Missouri Revised Statutes Section 1.170 and 1.180 were viewed as controlling in Arie, Corcoran, and Boyle, supra. The controlling aspect of these two general savings statutes was clearly annunciated in Comerio, supra. The court stated:

> "The amendment to the statute did not contain an express 'repealer' clause and therefore its retroactive effect is governed by the savings clauses in Missouri Revised Statutes Section 1.170 and 1.180

(1978). Musselman v. Anheuser Busch, Inc., 657 S.W. 2d 282, 285 (Mo.App.1983); Arie v. Intertherm, Inc., 648 S.W. 2d 142, 159 (Mo.App.1983). Under these savings clauses, the amendment did not affect 'acts done prior to August 13, 1982, but it applies to actions filed after said date."

Thus, in the case at bar, the Missouri Supreme Court reversed all prior case law. It then used this reversed holding to take a punitive damage award after entry of judgment by retroactively applying Missouri Service Letter statute Section 290.140 RSMo. 1982 to the case at bar.

This decision also is a reversal of the holding with reference to Art. I, Section 13 of the Constitution of Missouri (1945). In State ex rel St. Louis--San Francisco Railway v. Buder, 515 S.W.2d 409 (Mo.banc.1974), the court held that Art. I, Section 13 prohibited retrospective application of laws affecting substantive or vested rights. The general principle for retroactive application would require clear intent of the legislature for retroactive application and no affect on a "vested right". Harden, supra. In this case, there was no clear intent of the legislature

and there was an affect on a "vested right".

This case deals with a reversal of an interpretation of the retrospective intent of the legislature. A similar case is Beecher, supra. While that case was pending, the Supreme Court of Georgia reversed an earlier decision concerning expenses of litigation and attorney fees. The trial judge denied recovery of the expense and attorney fees in Beecher as the Supreme Court of Georgia holding came before the judgment. The court in Beecher stated, "verdict for the additional items had not ripened into a 'vested right' which could survive that ruling." It then continued to state that had the ruling come down after judgment, "the claim for the additional items would have become a 'vested right' and insulated from that ruling." Dept. of Transportation v. Kindrichs, 150 Ga.App. 9, 256 S.E. 2d 610 (1979); Housing Authority v. Southern R. Co., 150 Ga. App. 4, 256 S.E.2d 606 (1979). This decision is directly in conflict with the case at hand. Since "vested rights" are protected by the United States

Constitution, it is of extreme importance that the Supreme Court of the United States clarifies when "vested rights" may be abrogated by judicial retrospective application of a statute.

3. The destruction of a "vested right" is a violation of the due process clause of the Fourteenth Amendment, U.S.C.A. Const. Amend. 14, Sec. 1. "A right of action may be vested, and if so, it become property of him in whom it is vested, and the destruction of such a vested right is a violation of the due process clause of the 14th Amendment." Barr v. Preskitt, 389 F. Supp. 496 (1975); Gibbes v. Zimmerman, 290 U.S. 326, 54 S. Ct. 140, 78 L.Ed. 342 (1933); Graham v. Goodwell, 282 U.S. 409, 51 S.Ct. 186, 75 L.Ed. 415 (1930); Forbes Pioneer Boat Line v. Everglades Drainage Dist., 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1922). In the case at hand, Plaintiff was deprived of his vested right not in a cause of action, but in a judgment by the Supreme Court reversing itself.

A state legislature can't take away a

"vested right" in a punitive damage award after judgment by retroactively applying a statute. Following logical reasoning then, a state Supreme Court should not be able to reverse itself and retroactively apply a statutory amendment to take away a "vested right" in a punitive damage award after judgment. This is especially true when almost three years of case law established that the statutory amendment was not retroactive. This reasoning is found by implication in Beecher, supra. This solidification of this principle by the United States Supreme Court is now necessary.

(j) Appendix

(i)

IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

Division One

CLAY W. DIPPEL,	) No. 50279
Plaintiff-Respondent,	) Appeal from the Circuit Court of the City of St. Louis
vs.	) Hon. Michael F. Godfrey, Judge
TACO BELL CORP.,	)
Defendant-Appellant.	) OPINION FILED
	) July 22, 1986

Clay W. Dippel (employee) sued his former employer Taco Bell Corp. alleging violation of Sec. 290.140 RSMo. 1978, the service letter statute. The jury returned a verdict awarding employee $10,000.00 compensatory and $50,000.00 punitive damages. After various post-trial motion, the trial court left intact the award of punitive damages, but set aside the compensatory damages and awarded, instead, $1.00 nominal damages. Taco Bell appeals, challenging only the award of punitive damages. The judgment for nominal damages is affirmed; the judgment for punitive damages is reversed.

In Taco Bell's sole point on appeal it asserts the issue of punitive damages was not a jury question because the evidence failed to show Taco Bell knowingly and intentionally supplied a deficient service letter to employee and therefore employee failed to make a submissible case on punitive damages.

While this appeal was pending, the Missouri Supreme Court handed down Vaughan v. Taft Broadcasting Co., 708 S.W. 2d 656 (Mo. banc

1986), which addressed directly the issue of punitive damages under the service letter statute. In Vaughan, plaintiff filed his action in April 1980. Judgment in his favor awarding him both actual and punitive damages under the service letter statute was entered in November 1983.

Before the judgment was entered, Sec. 290.140 of the service letter statute was amended, effective August 13, 1982, to permit the award of punitive damages only when there is evidence that the employer failed to furnish a service letter when an employee requests one. The amendment also directs that no award of punitive damages shall be based upon the content of any such letter.

Defendant in Vaughan appealed, asserting among other things, that the trial court's submission of an instruction on punitive damages was erroneous because the service letter statute as amended specifically denied the recovery of punitive damages where the letter had been supplied.

Plaintiff responded that the amended

statute did not apply because his cause of action accrued and his case was filed prior to August 13, 1982, the effective date of the amended service letter statute. Plaintiff relied upon State ex rel. Deering v. Corcoran, 652 S.W. 2d 228 (Mo. App. 1983) to support his position. In Deering, this court held that the 1982 amendment to the service letter statute did not preclude punitive damages in a suit commenced before the effective date of the amendment but in which no judgment had been entered before the effective date of the statute. Id. at 230.

The Missouri Supreme Court rejected plaintiff's position and expressly stated that "the holding in Deering and any cases relying upon Deering, should no longer be followed". Vaughn, 708 S.W. 2d at 661. The Supreme Court concluded that the trial court erred in submitting a punitive damages instruction to the jury; that plaintiff could not recover punitive damages because he had no vested right to such damages at the time the 1982 statute became effective. Id. at 660.

Employee filed his action against Taco Bell prior to August 13, 1982, the effective date of the amendment to the service letter statute. The judgment awarding employee punitive damages, however, was not entered until May 15, 1985, followed by amendments of the judgment on June 7 and June 10, 1985.

Although the trial court could not have been aware of the holding in Vaughan and this case was appealed to this court prior to Vaughn, Vaughan is controlling. An appellate court must decide a case on the basis of the law in effect at the time of the decision. Sturgess v. Guerrant, 583 S.W.2d 258, 262 [1] (Mo. App. 1979).

Respondent's motion to dismiss the appeal and motion for damages for frivolous appeal which were taken with the case are denied.

The judgment for nominal damages is affirmed; the judgment for punitive damages is reversed.

SS/Robert O. Snyder
ROBERT O. SNYDER, JUDGE

SS/Gerald M. Smith
GERALD M. SMITH, JUDGE

Concurs

SS/Carl R. Gaertner
CARL R. GAERTNER, PRESIDING JUDGE

Concurs

(ii)

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

Wednesday, May 15th, 1985

Clay W. Dippel,	) Cause No. 812-09572
Plaintiff,	) Division No. 6
-vs-	)
Taco Bell, a Corporation, and Ron Ayala,	)
Defendants.	)

JUDGMENT

This action came on for trial before the Court and a jury, the parties appearing by their respective attorneys, and the issues having been duly tried and the jury having duly rendered its verdict.

Wherefore, it is considered and adjudged by the Court that the plaintiff, Clay W. Dippel have and recover of the defendant, Taco Bell, a Corporation, the sum of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS for damages and FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS for punitive damages, with interest thereon as provided by law, together with the costs of

this proceeding and that execution issue therefor.

Whereas on May 14th, 1985 the Court sustained defendant, Ron Ayala's motion for a directed verdict as to Count II of the petition.

Wherefore, it is further considered and adjudged by the Court that the plaintiff, Clay W. Dippel take nothing by reason of his cause of action as to Count II of the petition against defendant, Ron Ayala, that the Defendant, Ron Ayala be discharged and go hence without day as to said cause of action.

SS/Michael F. Godfrey
Judge

May 31, 1985
Date approved

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

Friday, June 7, 1985

CLAY W. DIPPEL)
)
Plaintiff,)
) Cause No. 812-09572
vs.)

	)	Division No. 6
TACO BELL,	)	
A Corporation, and	)	
Ron Ayala,	)	
	)	
Defendants	)	

AMENDED JUDGMENT

In accordance with Rule 75.01 of the Supreme Court Rules, the judgment entered in this cause on Wednesday, May 15, 1985, hereby is amended in the following respect:

This action came on for trial before the Court and a jury, the parties appearing by their respective attorneys, and the issues having been duly tried and the jury having duly rendered its verdict.

Wherefore, it is considered and adjudged by the Court that the plaintiff, Clay W. Dippel have and recover of the Defendant, Taco Bell, A Corporation, the sum of One Dollar ($1.00) for damages and Fifty Thousand and no/100 ($50,000.00) Dollars for punitive damages, with interest thereon as provided by law, together with the costs of this proceeding and execution issue therefore.

Whereas on May 14, 1985, the Court

sustained defendant, Ron Ayala's motion for a directed verdict as to Count II of the petition, now therefore, judgment is hereby entered in favor of defendant, Ron Ayala and against plaintiff, Clay W. Dippel on Count II of plaintiff's First Amended Petition.

Wherefore, it is further considered and adjudged by the Court that the plaintiff, Clay W. Dippel take nothing by reason of his cause of action as to Count II of the said petition against defendant, Ron Ayala, and that the defendant, Ron Ayala be discharged and that he go hence without day as to said cause of action.

SO ORDERED:

SS/Michael F. Godfrey
Judge

June 7, 1985
Date

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

Friday, June 10, 1985

CLAY W. DIPPEL	)	
	)	
Plaintiff,	)	
	)	Cause No. 812-09572
vs.	)	
	)	Division No. 6
TACO BELL,	)	
A Corporation, and	)	
ron Ayala,	)	
	)	
Defendants.	)	

AMENDED JUDGMENT

In accordance with Rule 75.01 of the Supreme Court Rules, the judgment entered in this cause on Wednesday, May 15, 1985, and Friday, June 7, 1985, hereby further is amended in the following respect:

This action came on for trial before the Court and a jury, the parties appearing by their respective attorneys, and the issues having been duly tried and the jury having duly rendered its verdict.

Wherefore, it is considered and adjudged by the Court that the plaintiff, Clay W. Dippel have and recover under Count I of the First Amended Petition of the Defendant, Taco Bell, A Corporation, the sum of One Dollar ($1.00) for damages (Nominal) and Fifty Thousand and

no/100 ($50,000.00) Dollars for punitive damages, with interest thereon as provided by law, together with the costs of this proceeding and that execution issue therefor.

Whereas on May 14, 1985, the Court sustained defendant's motion for a directed verdict as to Count II of the petition, now therefore, judgment is hereby entered in favor of defendant, Ron Ayala and against plaintiff on Count II of plaintiff's First Amended Petition.

Wherefore, it is further considered and adjudged by the Court that the plaintiff, Clay W. Dippel take nothing by reason of his cause of action as to Count II of the said petition against defendants, Ron Ayala and Taco Bell, a Corporation, be discharged as to Count II and that they go hence without day as to said cause of action.

SO ORDERED:

SS/Michael F. Godfrey
Judge

June 10,, 1985
Date

Joe H. VAUGHAN,
Plaintiff-Respondent,

v.

TAFT BROADCASTING COMPANY,
Defendant-Appellant.

No. 67424.

Supreme Court of Missouri,
En Banc.

April 15, 1986.

Plaintiff, Joe Vaughan, sued Taft Broadcasting Company, owner of WDAF radio station, alleging violation of the service letter statute, section 290.140, RSMo 1978. The jury awarded plaintiff $1.00 in actual damages and $173,670.83 in punitive damages; the Court of Appeals, Western District, affirmed. This Court transferred the case to determine whether plaintiff can recover actual and punitive damages under the service letter statute. Judgment for actual damages affirmed; judgment for punitive damages reversed.

Appellant contends: (1) the trial court erred in submitting a punitive damages instruction because section 290.140(2), RSMo

Cum.Supp.1982, denies recovery for punitive damages; (2) the trial court erred in submitting a punitive damages instruction because there was not substantial evidence of malice; (3) the verdict for punitive damages was excessive and the result of bias and prejudice; (4) the jury verdict for punitive damages was improper because it resulted from an agreement to be bound by a quotient verdict; (5) the trial court erred in admitting a letter into evidence because it was prejudicial; (6) the trial court erred in denying defendant's motion for a directed verdict because there was insufficient evidence that the service letter did not correctly state the true cause of plaintiff's termination; and (7) the trial court erred in allowing defendant to argue as substantive evidence in closing argument deposition testimony used to refresh recollection.

Plaintiff was first employed by defendant in the summer of 1976 as a part-time employee filling in for various employees. Plaintiff was doing on-air broadcasting and had other duties connected with the radio station.

During this time, plaintiff received positive comments from management regarding his performance.

In May of 1978, plaintiff was offered a full-time position with WDAF. Plaintiff had been eager to become full time and immediately accepted the offer. Plaintiff's manager, Charles Gray, told him to keep quiet about becoming full time because the next person hired at WDAF needed to be black in order to meet EEOC requirements. In order to meet EEOC requirements, Gray prepared a recruitment source log detailing the twelve people he had interviewed for the position, even though the job had been filled. On June 16, 1978, Gray issued a memorandum stating, "After interviewing many applicants for the job, it became quite obvious that the best and most qualified candidate was right here in the building."

After becoming full time, plaintiff was not advised of any dissatisfaction with his performance. To the contrary, WDAF used plaintiff's coverage of a cave-in during

construction of the Hyatt-Regency Hotel to promote its radio station. In addition, WDAF filmed a television commercial touting its news staff, including plaintiff.

Defendant's FCC license was scheduled for renewal in 1980; its renewal application was to be filed by October 1979. Defendant understood that the FCC could use the station's EEO hiring practices to deny the license renewal and that hiring a black would help the station meet EEOC guidelines.

In November 1978, the Missouri Commission on Human Rights began an investigation into hiring practices at Kansas City radio and television stations. The Commission wished to meet with defendant's management; however, defendant refused to meet with the Commission until June 1979.

In February 1979, Ted Griffin, Executive Vice President of the Missouri Broadcasters Association (MBA), circulated a letter to all Kansas City MBA stations, including WDAF. The letter advised the stations that the Human Rights Commission planned to evaluate

employment practices and that although he had tried to convince the Commission there was no problem at the Kansas City stations, the Commission refused to back down from its investigation. Griffin also stated he though the broadcasters would have a problem at license renewal time.

On March 28, 1979, Gray told plaintiff that he was no longer employed at WDAF because Gray did not like his "air sound." Gray and David Martin, the general manager of WDAF, testified they decided to fire plaintiff in November of 1978 because he was performing inadequately. In December of 1978, Gray began recruiting Cecil Hickman, a black newsman with radio station KCMO. The effort to recruit Hickman failed initially; but after defendant increased the salary offer and guaranteed Hickman a raise in six months, he accepted the position. No other person on the staff had ever been offered a guaranteed pay increase. Gray documented his recruitment efforts in a memorandum to offer proof to the government that WDAF was trying to hire a black reporter.

Following his termination, plaintiff requested Gray to write a letter stating his employment to show a potential future employer. After an inadequate response by Gray and a second request by plaintiff, Gray wrote to plaintiff stating he would prefer to respond to specific inquiries from prospective employers. On June 4, plaintiff again wrote Gray and Martin requesting a letter setting forth the three areas covered by the service letter statute. On June 19, 1979, Gray wrote a letter stating that plaintiff had been employed by WDAF from June 19, 1978, to March 28, 1979. The letter listed plaintiff's duties and stated that he had been terminated because he had not adequately responded to emergency situations and that defendant was dissatisfied with plaintiff's performance of air duties.

Plaintiff filed his action in April of 1980 alleging defendant had not stated the true cause for his termination in the service letter. Judgment in his favor was entered in November of 1983.

Appellant asserts that the trial court erred in submitting an instruction on punitive damages because the service letter statute specifically denies recovery of punitive damages in plaintiff's situation.

The service letter statute was originally enacted in 1905 to remedy the evil of blacklisting of employees by railways and other corporations. Cheek v. Prudential Insurance Co., 192 S.W. 387 (Mo.1917). Although the statute itself did not specifically create a private cause of action in the employee, the court in Cheek reasoned that since the duty imposed by the statute was for the benefit of a class of individuals as well as the public good, a right of action would be given to any member of the class damaged by a breach of that duty. Id. at 389. Punitive damages could be awarded although the recovery of actual damages be nominal. State ex rel. St. Joseph Belt Railway Co. v. Shain, 341 Mo. 733, 108 S.W.2d 351, 356 (1937).

In 1982, section 290.140 was amended and reads as follows:

290.140. Letter of dismissal, when--failure to issue, damages--punitive damages, limitations.--1. Whenever any employee of any corporation doing business in this state and which employs seven or more employees, who shall have been in the service of said corporation for a period of at least ninety days, shall be discharged or voluntarily quit the service of such corporation and who thereafter within a reasonable period of time, but not later than one year following the date the employee was discharged or voluntarily quit, requests in writing by certified mail to the superintendent, manager or registered agent of said corporation, with specific reference to the statute, it shall be the duty of the superintendent or manager of said corporation to issue to such employee, within forty-five days after the receipt of such request, a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such

corporation and the duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service.

2. Any corporation which violates the provisions of subsection 1 of this section shall be liable for compensatory but not punitive damages but in the event that the evidence establishes that the employer did not issue the requested letter, said employer may be liable for nominal and punitive damages; but no award of punitive damages under this section shall be based upon the content of any such letter.

(Emphasis added.)

[1] Appellant contends the 1982 statute applies to this case and prevents an award of punitive damages. Respondent argues the 1982 statute does not apply because his cause of action accrued and his case was filed prior to the effective date, August 13, 1982, of the amended service letter statute.

Appellant contends that section 1.160, RSMo 1978, governs this issue because section

290.140 has been construed to be a penal statute. See Barrows v. Riss & Co., 238 Mo.App. 334, 179 S.W.2d 473 (1944); Walker v. St. Joseph Belt Railway Co., 102 S.W.2d 718 (Mo.App.1937). Section 1.160 provides:

1.160 Effect of repeal of penal statute.--No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except (1) that all such proceedings shall be conducted according to existing laws; and (2) that if the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense, the penalty or punishment shall be assessed according to the amendatory law.

(Emphasis added.)

Appellant submits the legislature knew,

when it amended the service letter statute, that by reducing a penalty by statutory amendment, the reduced penalty would, by virtue of section 1.160, be applied to all pending actions brought under the statute. State ex rel. Cole v. Nigro, 471 S.W.2d 933 (Mo.banc 1971). Section 1.160 governs the repeal or amendment of statutes relating to criminal offenses, not civil actions; therefore, section 1.160 has no application to an action brought under Missouri's service letter statute. Crompton v. Curtis-Toledo, Inc., 661 S.W.2d 645 (Mo.App.1983).

Appellant argues alternatively that the amended statute affects a remedy only and does not impair a substantive right; therefore, it should be applied retrospectively to plaintiff's case.

Under Article I, section 13 of the Missouri Constitution, no statute retrospective in its operation can be enacted. Scheidegger v. Greene, 451 S.W.2d 135 (Mo.1970). This provision does not apply, however to a statute dealing only with procedure or remedies. Id.

at 137. "No person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights, and where a new statute deals only with procedure it applies to all actions including those pending or filed in the future." Id. Nor does the federal constitution prevent a remedial or procedural provision from being applied retroactively because "although a vested cause of action is property . . ., the [plaintiff] has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure." Gibbes v. Zimmerman, 290 U.S. 326, 332, 54 S.Ct. 140, 142, 78 L.Ed. 342 (1933).

The issue, therefore, is whether the plaintiff had a vested right to punitive damages at the time the amended statute became effective.

[2] This Court finds that under Missouri law, punitive damages are remedial and a plaintiff has no vested right to such damages

prior to the entry of judgment. Arie v. Intertherm, Inc., 648 S.W.2d 142, 159 (Mo.App.1983). Punitive damages are never allowable as a matter of right and their award lies wholly within the discretion of the trier of fact. DeBow v. Higgins, 425 S.W.2d 135 (Mo.1968). The purpose of punitive damages is to inflict punishment and to serve as an example and deterrent to similar conduct. Polk v. Missouri-Kansas-Texas Railroad Co., 351 Mo. 865, 174 S.W.2d 176, 180 (1943); Arie, 648 S.W.2d at 159. The reasoning for finding punitive damages remedial and applying the statute retroactively was stated in Smith v. Hill, 12 Ill.2d 588, 147 N.E.2d 321, 327 (1958):

> The Act in barring punitive damages merely establishes a "public policy" that in the interest of society in the particular class of cases such damages should not be awarded. Such damages being allowed in the interest of society, and not to recompense solely the victim, to deny them cannot be said to deny any constitutional right or to

encroach upon any judicial function, or to violate any constitutional guaranty of separation of powers.

This Court concludes that the trial court erred in submitting a punitive damages instruction to the jury; plaintiff cannot recover punitive damages because he had no vested right to such damages at the time the 1982 statute became effective. See Louisville & N.R. Co. v. Street, 164 Ala. 155, 51 So. 306 (1909); American Bank & Trust Co. v. Community Hospital, 36 Cal.3d 359, 204 Cal.Rptr. 671, 683 P.2d 670 (1984); Teasley v. Mathis, 243 Ga. 561, 255 S.E.2d 57 (1979); Smith v. Hill, 12, Ill.2d 588, 147 N.E.2d 321 (Ill.1958); Jefferson Disposal Co., Inc. v. Parish of Jefferson, 603 F.Supp. 1125 (E.D.La.1985); Convention Center Inn, Ltd. v. Dow Chemical Co., 19 Ohio Misc.2d 15, 19 Ohio B.R. 422, 484 N.E.2d 764 (1984). See also Jasperson v. Purolator Courier Corp., 765 F.2d 736 (8th Circ.1985).

[3] Respondent relies upon State ex rel. Deering v. Corcoran, 652 S.W.2d 228

(Mo.App.1983), where the court held that the 1982 amendment to the service letter statute does not preclude punitive damages in a suit commenced before the effective date of the amendment but in which no judgment has been entered. Id. at 230. The court in Deering reasoned that if the legislature had intended retrospective application, it would have so specifically provided. Id. at 229. A statutory provision that is remedial or procedural, however, must be applied retrospectively unless the legislature expressly states otherwise. State ex rel. LeNeve v. Moore, 408 S.W.2d 47, 49 (Mo.banc 1966). In addition, the court in Deering concluded that the 1982 statute should be be applied retrospectively because sections 1.170 and 1.180, RSMo 1978, prevent pending actions from being affected by a repealing statute. Deering, 652 S.W.2d at 229. The conclusion reached in Deering is erroneous because sections 1.170 and 1.180 apply only if plaintiff has a vested right. Arie, 648 S.W.2d at 159. Therefore, the holding in

Deering and any cases relying upon Deering should no longer be followed.

[4] Appellant contends that the trial court erred in admitting into evidence the letter from Ted Griffin advising WDAF of his attempt to dissuade the Human Rights Commission from investigating the Kansas City stations. If proffered evidence is admissible for any purpose, it may not be excluded. Martin v. Mercantile Trust Co., 293 S.W.2d 319 (Mo.1956). The letter from Griffin was properly admitted to show defendant's notice of the pending investigation by the Human Rights Commission. Appellant argues that the letter contained prejudicial comments made by Griffin. The trial court did not err in admitting this letter because the statements urged as inflammatory are relevant to the notice defendant received of the seriousness of the investigation and its importance to the licensing process.

[5] Appellant contends there was insufficient evidence to support a finding by the jury that the service letter did not

correctly state the true cause of plaintiff's termination. The evidence offered was entirely circumstantial; however, the existence of only circumstantial evidence on a material issue is no bar to recovery of and by itself. McCarthy v. Wulff, 452 S.W.2d 164, 168 (Mo.1970). The circumstantial evidence must establish the desired inference with such certainty as to cause it to be the more reasonable and probable of the conclusions to be drawn. Jordan v. Robert Half Personnel Agencies, 615 S.W.2d 574, 587 (Mo.App.1981). In reviewing the trial court's decision, the evidence must be considered favorably to plaintiff, and defendant's evidence must be disregarded unless it tends to support the submission. Wright v. Fox-Stanley Photo Products, Inc., 639 S.W.2d 407, 408 (Mo.App.1982).

[6] It was plaintiff's position that he was terminated because WDAF felt the need to hire a black in order to satisfy the Commission's investigation and to present a favorable view of its hiring practices for use

in its license renewal application. A review of the facts shows that plaintiff made a submissible case and that the evidence was sufficient to allow the jury to infer beyond speculation that the true reason plaintiff was terminated was to make it possible to hire a black and not because of plaintiff's inadequate job performance.

Appellant asserts the trial court erred in allowing plaintiff's counsel to use David Martin's deposition testimony in closing argument as substantive evidence when the deposition was used only to refresh Martin's recollection. Defendant made no objection at the time of argument and the claim that the argument was improperly permitted is foreclosed from consideration. Mueller v. Storbakken, 583 S.W.2d 179, 186 (Mo.banc 1979).

Because of this Court's determination that the 1982 service letter statute applies in this case, there is no need to consider appellant's remaining contentions regarding the punitive damages.

Accordingly, this Court affirms the trial court's judgment awarding plaintiff $1.00 nominal damages and reverses and vacates the award of punitive damages.

All concur.

(iii)

No. 68638

ED 50279

IN THE SUPREME COURT OF MISSOURI

September Session 1986

Clay W. Dippel, Plaintiff-Respondent,

vs. TRANSFER

Taco Bell Corp., Defendant-Appellant.

Now at this day, on consideration of Plaintiff-Respondent's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-SCT

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that

the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1986, and on the 14th day of October, 1986, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of October, 1986.

SS/ Thomas F. Simon
Clerk

D.C.

(iv) The following Notice of Appeal was filed by mailing same in the United States mail, postage prepaid, First Class mail, on January 9, 1987 to the courts and attorney for Defendant-Respondent as herein specified.

In The

UNITED STATES SUPREME COURT

CLAY W. DIPPEL,	)	United States Supreme Court
	)	Cause No. _____
Pltf-App.,	)	Missouri Supreme Court
	)	Cause No. 63638
vs.	)	Missouri Court of Appeals,
	)	Eastern District,
TACO BELL CORP.,	)	Appellate No. 50279
	)	Circuit Court, City of St. Louis
Def.-Resp.	)	Cause No. 812-09572
		October, 1986 Term

NOTICE OF APPEAL
TO UNITED STATES SUPREME COURT

TO: Missouri Supreme Court
Supreme Court Bldg.
Jefferson City, MO 65102

Missouri Court of Appeals
Eastern District
111 N. 7th Street
St. Louis, MO 63101

Circuit Court
City of St. Louis
Hon. Michael F. Godfrey
c/o Division No. 6
Tucker & Market Streets
St. Louis, MO 63101

Attorney General of
the State of Missouri
Supreme Court Bldg.
Jefferson City, MO 65102

Mr. John R. McFarland
Attorney for Def.-Resp.
One Mercantile Ctr., Suite 2900
St. Louis, MO 63101

Under the provisions of Rules 10, 12, and 28.4.(c), you are hereby notified that Clay W. Dippel appeals to the United States Supreme Court from the Opinion of the Missouri Court of Appeals, Eastern District, dated July 22, 1986, from which application to transfer to the Missouri Supreme Court by Clay W. Dippel was denied by the Missouri Supreme Court October 14, 1986, which reversed outright a unanimous verdict and judgment for Plaintiff and against Defendant Taco Bell reduced by the trial court to $1.00 nominal damages plus $50,000.00 punitive damages. This appeal to the United States Supreme Court is under 28 U.S.C. 1257(2) within the time limits as specified under 28 U.S.C. 2101(c). 28 U.S.C., paragraph 2403(b) may be applicable.

GERRITZEN & GERRITZEN

By: _____

Ray A. Gerritzen #15967
Attorney for Pltf-App.
610 Locust Street
Suite 2072
St. Louis, MO 63101-1794
(314) 231-2786

BEST AV

I, Ray A. Gerritzen, being duly sworn upon my oath, state that all parties required to be served have been served and that the list of the names and address of those parties who were served consists of those names specified under "TO" at the beginning of this notice and that service was made by depositing in a United States postal mailbox, with First-Class postage prepaid, and properly addressed to the clerk of the United States Supreme Court as well as all of the parties specified above, within the time allowed for filing, namely on January 9, 1987.

RAY A. GERRITZEN

Subscribed and sworn to before me this 9th day of January, 1987.

My Commission Expires:

Notary Public

AILABLE COPY

In The

UNITED STATES SUPREME COURT

October Term, 1986

CLAY W. DIPPEL,	) United States Supreme Court
	) Cause No. _____
Pltf.-App.,	) Missouri Supreme court
	) Cause No. 63638
vs.	) Missouri Court of Appeals,
	) Eastern District,
TACO BELL CORP.,	) Appellate No. 50279
	) Circuit Court, City of St. Louis
Def.-Resp.	) Cause No. 812-09572

CERTIFICATE OF MAILING TO THE
CLERK OF THE UNITED STATES SUPREME COURT

I, Herbert B. Roberts, being duly sworn upon my oath, state that I am a member of the Bar of the United States Supreme Court and that to my knowledge forty (40) copies of the Jurisdictional Statement of Appellant, in the case of Clay W. Dippel v. Taco Bell Corp., were timely filed by mailing same addressed to the Clerk, United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, on Monday, January 12, 1987, at approximately 3:00 p.m., at the United States Post Office, 9th and Olive Streets, St. Louis, Missouri, with First-Class postage prepaid and that January 12, 1987 was within 90 days of the

Missouri Supreme Court Denial of Transfer

Ruling of October 14, 1986.

HERBERT B. ROBERTS
Attorney at Law
611 Olive, Suite 2067
St. Louis, MO 63101

Subscribed and sworn to before me this 12th day of January, 1987.

My Commission Expires:

March 23, 1987

Notary Public

In The

UNITED STATES SUPREME COURT

October Term, 1986

CLAY W. DIPPEL,	) United States Supreme Court
	) Cause No. _____
Pltf.-App.,	) Missouri Supreme Court
	) Cause No. 63638
vs.	) Missouri Court of Appeals,
	) Eastern District,
TACO BELL CORP.,	) Appellate No. 50279
	) Circuit Court, City of St. Louis
Def.-Resp.	) Cause No. 812-09572

PROOF OF SERVICE

I, Ray A. Gerritzen, being duly sworn upon my oath, state that all parties required to be served with the Jurisdictional Statement have been served by mailing a separate copy to each person on the hereinafter stated list, by depositing same in the United States Post Office, 9th and Olive Streets, St. Louis, Missouri, with First-Class postage prepaid at approximately 3:00 p.m. on January 12, 1987:

Missouri Supreme Court
Supreme Court Bldg.
Jefferson City, MO 65102

Missouri Court of Appeals
Eastern District
111 N. 7th Street
St. Louis, MO 63101

Circuit Court
City of St. Louis
Hon. Michael F. Godfrey
c/o Division No. 6
Tucker & Market Streets
St. Louis, MO 63101

Attorney General of
the State of Missouri
Supreme Court Bldg.
Jefferson city, MO 65102

Mr. John R. McFarland
Attorney for Def.-Resp.
One Mercantile Ctr., Suite 2900
St. Louis, MO 63101

RAY A. GERRITZEN

Subscribed and sworn to before me this 12th day of January, 1987.

My Commission Expires:
July 11, 1989

Notary Public

GERRITZEN & GERRITZEN

By: _____
Ray A. Gerritzen #15967
Attorney for Pltf.-App.
610 Locust Street
Suite 2072
St. Louis, MO 63101-1794
(314) 231-2786

AVAILABLE COPY

Supreme Court, U.S.
FILED
FEB 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CLAY W. DIPPEL,
Appellant,

vs.

TACO BELL CORP.,
Appellee.

On Appeal From The Supreme Court of Missouri

MOTION OF APPELLEE TO DISMISS

JOHN R. MCFARLAND
Counsel Of Record

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Counsel for Appellee
Taco Bell Corp.

February 11, 1987

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

15pp

LISTING OF PARTIES

The parties named in the caption are the only parties to this action.

Pursuant to Supreme Court Rule 28.1, appellee Taco Bell Corp. identifies PepsiCo, Inc. as its parent company.

TABLE OF CONTENTS

	Page
Listing of Parties	i
Table of Contents	iii
Table of Authorities	iv
Argument	1
1. Jurisdiction by appeal under 28 U.S.C. §1257(2) does not lie because appellant failed to make any explicit claim in the state courts that Mo. Rev. Stat. §290.140 (1982), as applied, is repugnant to the Due Process Clause of the federal Constitution	2
2. The appeal lacks any substantial federal question because appellant had no vested right to an award of punitive damages prior to August 13, 1982, the effective date of the amendment to Mo. Rev. Stat. §290.140 (1982), which barred any award of punitive damages in actions involving the contents of a service letter, and the court below committed no error in applying this rule on the direct appeal of the case	4
Conclusion	8

TABLE OF AUTHORITIES

Page

Cases:

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 6, 7

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 6

Eimer v. Texaco, Inc., 518 F.2d 807 (8th Cir. 1975) 5

Ettor v. City of Tacoma, 228 U.S. 148 (1913) 5, 6

Funkhouser v. J.B. Preston Co., Inc., 290 U.S. 163 (1933) 4

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 6

Gibbes v. Zimmerman, 290 U.S. 326 (1933) 5

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 7

Hamling v. United States, 418 U.S. 87 (1974) 7

Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) .. 7

Hanson v. Denckla, 357 U.S. 235 (1958) 2

Hardware Dealers' Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151 (1931) 5

Jefferson Disposal Company, Inc. v. Parish of Jefferson, Louisiana, 603 F. Supp. 1125 (E.D.La. 1985) . 5, 7

League v. Texas, 184 U.S. 156 (1902) 4, 5

New York Central R.R. Co. v. White, 243 U.S. 188 (1917) 6

TABLE OF AUTHORITIES (Continued)

Page

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 2

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 6

Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656 (Mo. 1986) (en banc) ..... *passim*

Constitutional Provisions:

U.S. CONST. amend. XIV, §1 2

Statutes:

28 U.S.C. § 1257(2) 1,2,4

Mo. Rev. Stat. §290.140 (1982) ..... *passim*

Other Authorities:

Soebblig, *The Missouri Service Letter Statute Revisited,* 34 Journal of the Missouri Bar 80 (1978) 6

No. 86-1178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CLAY W. DIPPEL,
Appellant,

vs.

TACO BELL CORP.,
Appellee.

On Appeal From The Supreme Court of Missouri

MOTION OF APPELLEE TO DISMISS

Pursuant to Supreme Court Rule 16.1 (a) and (b), appellee Taco Bell Corp. moves to dismiss the instant appeal for lack of jurisdiction under 28 U.S.C. §1257(2), on the ground that appellant failed to make any explicit claim in the state courts that Mo. Rev. Stat. §290.140 (1982),[1] as applied, is repugnant to the Due Process Clause of the federal Constitution. In the alternative, pursuant to Supreme Court Rule 16.1 (b), appellee moves to dismiss the appeal for want of a substantial federal question, on the ground that appellant had no vested right to an award of punitive damages prior to August 13, 1982, the effective date of the amendment to §290.140, which barred any award of punitive damages in actions involving the contents of a service letter, and the court below committed no error in applying this rule on the direct appeal of the case.

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[1] Hereinafter, the statute will be referred to in text as §290.140.

ARGUMENT

1. Jurisdiction By Appeal Under 28 U.S.C. §1257(2) Does Not Lie Because Appellant Failed To Make Any Explicit Claim In The State Courts That Mo. Rev. Stat. §290.140 (1982), As Applied, Is Repugnant To The Due Process Clause Of The Federal Constitution.

Essential to this Court's appellate jurisdiction under 28 U.S.C. §1257(2) is a showing by appellant that he made an explicit insistence in the state courts that §290.140, as applied, is repugnant to the Due Process Clause of the federal Constitution, U.S. CONST. amend. XIV, §1. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 562 n.4 (1980); *Hanson v. Denckla,* 357 U.S. 235, 244 (1958). In this case, appellant wholly failed to make any such insistence. Accordingly, the appeal must be dismissed for lack of jurisdiction in this Court.

In neither of the only two instances below in which appellant made mention of the Due Process Clause did he make even a single reference to *any statute,* much less to §290.140. In each case, appellant asserted precisely the same claim:

> The *change of law* after argument of the instant case in the Court of Appeals constitutes a violation of the Due Process clauses of both the Constitution of the State of Missouri, Article I, Section 10, and the 5th and 14th Amendments to the Constitution of the United States of America in that it denies Plaintiff his adjudicated right of recovery with no opportunity whatever to address the issue on which he was denied recovery and the appellate court in this instance has become an advocate for Defendant and raised an issue waived and abandoned by Defendant in its appeal.

Appellant's Application For Rehearing or in the alternative Transfer To The Supreme Court, ¶3; Appellant's Application For Transfer To The Supreme Court, ¶4 (emphasis added).

Undoubtedly, the "change of law" referred to by appellant was the decision by the Missouri Supreme Court in *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656 (Mo. 1986) (en banc),[2] which the court of appeals below found dispositive of this appeal. App. 28. For example, in his questions presented and throughout his jurisdictional statement, appellant repeatedly criticizes the *Vaughan* decision and particularly that portion in which the Missouri Supreme Court rejected contrary intermediate appellate court opinions upon which appellant relied below. Jurisdictional Statement, 1, 17, 21, 23-24. Yet, appellant's criticism of the Missouri Supreme Court's rejection of those cases is not tantamount to an explicit insistence that any portion of §290.140, as applied to him, is unconstitutional.[3] In any event, this Court should not be forced to speculate what appellant meant by that phrase in determining whether it has jurisdiction over this appeal.

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[2] In *Vaughan*, it was held that a plaintiff seeking punitive damages based upon the contents of a service letter could not recover such damages when the case was filed prior to August 13, 1982, the effective date of the amendment to §290.140, and no judgment was entered prior to that effective date. Regarding those lower court cases holding that the amendment did not preclude punitive damages in a suit commenced before the effective date of the amendment but in which no judgment had been entered, the court stated that they "should no longer be followed." *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d at 661.

[3] Certainly, the Missouri Court of Appeals did not regard appellant's use of this phrase as any such insistence. That court did not purport to determine the constitutionality of §290.140, but merely applied the holding of *Vaughan* decision. App. at 28. Indeed, the opinion of the court nowhere suggests that it perceived appellant's objections to rest upon the more narrow question of whether the statute could be applied to his case without offending the Due Process Clause.

Accordingly, the appeal should be dismissed for lack of jurisdiction under 28 U.S.C. §1257(2) due to appellant's failure to insist before either the Missouri Court of Appeals or the Missouri Supreme Court that §290.140, as applied to him, is unconstitutional.

2. The Appeal Lacks Any Substantial Federal Question Because Appellant Had No Vested Right To An Award Of Punitive Damages Prior To August 13, 1982, The Effective Date Of The Amendment To Mo. Rev. Stat. §290.140 (1982), Which Barred Any Award Of Punitive Damages In Actions Involving The Contents Of A Service Letter, And The Court Below Committed No Error In Applying This rule On The Direct Appeal Of The Case.

Regardless of his failure to press before the courts below any claim necessary to support this Court's appellate jurisdiction, appellant now appears to set forth two separate constitutional objections to the judgment below. Although not made clear by his jurisdictional statement, appellant seems to claim on the one hand that the 1982 amendment to §290.140 could not be constitutionally applied to deny him the right to seek punitive damages in his then pending suit. On the other, appellant seems to claim that the application of the holding in *Vaughan* to his case by the court of appeals below, after the trial court entered a judgment in his favor allowing punitive damages, was similarly unconstitutional. Regardless of which of these theories appellant now seeks to advance, neither presents a substantial federal question.

This Court has emphasized that the mere retroactive application of a statute to pending civil litigation does not render it unconstitutional. *Funkhouser v. J.B. Preston Co., Inc.*, 290 U.S. 163, 167-68 (1933); *League v. Texas*, 184 U.S. 156, 161 (1902). This principle holds particular force with regard to statutory changes which merely affect the allowable remedy, for no one has a vested property right cognizable under the Due Process

Clause in any particular *form* of remedy. Such matters remain subject to legislative change. *Gibbes v. Zimmerman,* 290 U.S. 326, 332 (1933); *League v. Texas,* 184 U.S. at 161. Rather, all that is constitutionally required by the application of the statutory change to pending cases is that the parties are left with a substantial and efficient remedy. *Hardware Dealers' Mutual Fire Insurance Co. v. Glidden Co.,* 284 U.S. 151, 159 (1931); *Ettor v. City of Tacoma,* 228 U.S. 148, 155 (1913); *Jefferson Disposal Company, Inc.,* 603 F. Supp. 1125, 1136 (E.D.La. 1985).

Missouri's courts have not failed to appreciate these principles. On the contrary, the Missouri Supreme Court in *Vaughan* expressly stated that:

> [T]he federal constitution [does not] prevent a remedial or procedural provision from being applied retroactively because "although a vested cause of action is property . . ., the [plaintiff] has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

Vaughan v. Taft Broadcasting Co., 708 S.W.2d at 660, *quoting, Gibbes v. Zimmerman,* 290 U.S. at 332.

In enacting the 1982 amendment to §290.140, the Missouri legislature carefully ensured that both a substantial and efficient remedy would be preserved for all litigants whose claims involve the contents of a service letter issued by the employer. All such litigants, while not permitted to recover punitive damages,[4] may

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[4] While no legislative history regarding the amendment is available, the basis of the legislature's decision to bar such an award is apparent. Early on, it was noted that the statute allowed "a discharged employee to merely present evidence to a jury disputing the reasons given him for discharge by his employer and, thereby, in effect, permit a jury to award actual and punitive damages for a job ill-performed by the employee." *Eimer v. Texaco, Inc.,* 518 F.2d 807, 810 (8th Cir. 1975)

(footnote continued)

recover compensatory damages for any actual harm suffered. §290.140(2) (1982). Such "make whole" relief surely constitutes the substantial and efficient remedy required by principles of due process. On the other hand, the denial of punitive damages, which are simply "private fines levied by civil juries," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), raises no constitutional issue. Such damages merely constitute a penalty, in which no one can claim a vested right. *Cf., Ettor v. City of Tacoma*, 228 U.S. 148 (1913).

Nor is any substantial constitutional issue presented by virtue of the court of appeals' application of *Vaughan* to appellant's case while the case was on direct appeal to that court, notwithstanding the "change of law" decreed in *Vaughan*. In so doing, the court of appeals correctly relied upon a principle of Missouri law that where a change in the law occurs while a case is on direct appeal, the appellate court must decide the case on the basis of the law in effect at the time of its decision, App. 28, a principle which likewise has been well recognized in the decisions of this Court. *See, Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 (1969).

It thus follows that, contrary to appellant's assertions, no one has a vested right to insist that a rule of law will remain unchanged for his benefit. *New York Central R.R.Co. v. White*, 243 U.S. 188, 198 (1917); *see also, Duke Power Co. v. Carolina*

(Bright J., concurring). Later observing that the prospect of winning a punitive damages award under the statute had caused "a wellspring of frivolous litigation," one author likewise concluded that "the statute is being used to an increasing extent to harass and intimidate employers and to lay the groundwork for litigation irrespective of the contents of [the] letter." Soebblig, *The Missouri Service Letter Statute Revisited*, 34 Journal of the Missouri Bar 80, 85 (1978). Such criticisms have particular significance to this case inasmuch as appellant incurred no actual damages whatsoever as a result of the service letter given to him. Jurisdictional Statement, 12.

Environmental Study Group, Inc., 438 U.S. 59, 88 n. 32 (1978). This is true both after the suit has been filed and continues to be true until a final nonreviewable judgment is secured. *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986); *Jefferson Disposal Co. v. Parish of Jefferson, Louisiana*, 603 F. Supp. 1125, 1137 (E.D.La. 1985); *cf., Hamling v. United States*, 418 U.S. 87, 102 (1974). Because appellant had no vested right to insist upon the continued validity of those intermediate appellate court decisions holding that pending suits seeking punitive damages were not affected by the 1982 amendment to §290.140, the court of appeals below was constitutionally free to apply the contrary holding in *Vaughan* during its review of the case on direct appeal from the trial court.

Certainly, there may exist an equitable exception to the application of these principles in certain cases so as to prevent "manifest injustice," *Bradley v. Richmond School Board*, 416 U.S. at 717, but this exception does not reach private civil suits where the intervening change in law does not extinguish a cause of action. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16 (1981). Here, the change in law does not extinguish or even hinder any litigant's filing of a cause of action under §290.140, but merely precludes the imposition of one form of remedy — punitive damages — in cases involving the contents of a service letter. Indeed, a decision by the court of appeals failing to apply *Vaughan* to this case itself would have perpetrated manifest injustice because such a failure would have permitted plaintiff to recover precisely what the Missouri legislative decided to bar - a windfall award. *Id.*

Accordingly, the court below did not constitutionally err in applying the *Vaughan* holding to appellant's case while on direct appeal to that court.

CONCLUSION

For the foregoing reasons, appellee Taco Bell Corp. respectfully urges this Court to dismiss the appeal for lack of jurisdiction or, in the alternative, for want of a substantial federal question.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CLAY W. DIPPEL,

Appellant,

vs.

TACO BELL CORP.,

Appellee.

On Appeal From The Supreme Court of Missouri

APPELLANT'S REPLY BRIEF

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LISTING OF PARTIES

The parties named in the caption are the only parties to this action. Since 28 U.S.C. Section 2403(b) may be applicable, service shall be made on the attorney general of the State of Missouri.

TABLE OF CONTENTS

	Page
Listing of Parties	i
Table of Contents	ii
Table of Authorities	iii
Argument	2
1. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because Appellant alleged a 14th Amendment due process violation at the only times in the Missouri Courts when the federal right was at issue.....	2
2. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because the decision to retroactively apply Section 290.140 necessarily involves the decision whether such application is constitutional.....	4
3. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because the Missouri Supreme Court has decided the issue of the constitutionality of the retroactive application of Section 290.140 and that particular decision was relied upon in this case.....	6
Conclusion	8

TABLE OF AUTHORITIES

	Page
Cases:	
Arrowsmith v. Harmoning, 118 U.S. 194 (1885)	5
Charleston Federal Savings & Loan Assoc. v. Alderson, 342 U.S. 182 (1945)	4,5
Hiawassee Power Co. v. Carolina-Tenn Co., 252 U.S. 341 (1919)	5
Home Ins. Co. v. Dick, 281 U.S. 397 (1930)	7
Morrison v. Watson, 154 U.S. 111 (1894)	2
O'Neil v. Vermont, 144 U.S. 323 (1891)	5
Onondaga Nation v. Thacher, 189 U.S. 306 (1903)	5
Simmerman v. Nebraska, 116 U.S. 54 (1885)	5
Vaughan v. Taft Broadcasting, 708 S.W. 2d 656 (Mo.banc 1986)	passim
Whitfield v. Ohio, 297 U.S. 431 (1936)	2
Wilson v. Cook, 327 U.S. 474 (1946) ..	7
Constitutional Provisions:	
U.S.C.A. Const. Amend. 14, Section 1 .	passim
Statutes:	
Mo. Rev. Stat. Section 290.140 (Vernon 1982)	passim
28 U.S.C. Section 1257(2)	passim

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October Term, 1986

CLAY W. DIPPEL,

Appellant,

vs.

TACO BELL CORP.,

Appellee.

On Appeal From The Supreme Court of Missouri

BRIEF OPPOSING MOTION TO DISMISS

Pursuant to Supreme Court Rule 16.5, Appellant Clay W. Dippel files this brief in opposition to Appellee's Motion to Dismiss as jurisdiction was present under 28 U.S.C., Section 1257(2) on three theories. First, Appellant raised the 14th Amendment due process violation in the Missouri Supreme Court. Second, the decision to retroactively apply Missouri Revised Statute Section 290.140

(Vernon 1982)[1] necessarily involved the decision whether such application was constitutional. Finally, the Missouri Supreme Court already decided the specific issue of the constitutionality of retroactively applying Section 290.140, and that particular decision was relied upon and was the controlling decision in this case.

ARGUMENT

1. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because Appellant alleged a 14th Amendment due process violation at the only times in the Missouri Courts when the federal right was at issue.

It is well established that a claim of a federal right must be asserted in state court at the proper time for jurisdiction on appeal under 28 U.S.C. Section 1257(2). Morrison v. Watson, 154 U.S. 111, 115 (1894). Furthermore, that claim of a federal right doesn't have to be in the trial court. Whitfield v. Ohio, 297 U.S. 431 436 (1936). In this case, the issue of a violation of the

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[1] Hereinafter, the statute will be referred to as Section 290.140.

14th Amendment due process clause did not arise until the Missouri Court of Appeals, Eastern District, reversed the trial court based on the decision in Vaughan v. Taft Broadcasting, 708 S.W.2d 656 (Mo.banc 1986).

Once the federal right was at issue, Appellant asserted it in every subsequent pleading in Missouri Courts. Specifically, Appellant's Application for Rehearing or in the Alternative Transfer to the Supreme Court, paragraph 3; Appellant's Application For Transfer to the Supreme Court, paragraph 4, read:

> "The change of law after argument of the instant case in the Court of Appeals constitutes a violation of the Due Process clauses of both the Constitution of the State of Missouri, Article I, Section 10, and the 5th and 14th Amendments to the Constitution of the United States of America . . ."

The Appellee, in its Motion to Dismiss, Argument 1, page 3, states that the "change of law" referred to by Appellant was probably the decision in Vaughan, supra.[2] Vaughan is the

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[2] In Vaughan, the Supreme Court of Missouri reversed all prior precedent (footnote continued)

only "change of law" which was applied on appeal and this change of law was the controlling factor in the court of appeals decision. There is no room for speculation. It is the application of Vaughan to the present case which gives rise to the 14th Amendment due process violation. The application of a statute was drawn in question as repugnant to the U.S. Constitution, and the state court held that the application of the statute was constitutional. Therefore, the Supreme Court of the United States has jurisdiction on appeal under 28 U.S.C. Section 1257(2). Charleston Federal Savings & Loan Association v. Alderson, 324 U.S. 182 (1945).

2. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because the decision to retroactively apply Section 290.140 necessarily involves the decision whether such application is constitutional.

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concerning the retroactive application of Section 290.140 including 2 cases in which the Missouri Supreme Court refused Application to Transfer under which Appellant's judgment would have been secure.

The Supreme Court has jurisdiction over the judgment of a State Supreme Court when the judgment necessarily involves the decision whether a state statute conflicts with the Constitution of the United States, whether it is noticed in the opinion or raised for the first time on appeal. Arrowsmith v. Harmoning, 118 U.S. 194, 195 (1885). The dissent in O'Neil v. Vermont, 144 U.S. 323, 348 (1891), states, "The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided,a nd decided adversely to the Federal right."

In the present case, Appellant had a "vested right" in a punitive damage award after judgment. Pending appeal, the Missouri Supreme Court in Vaughan held that Section 290.140 could be retroactively applied to take away a punitive damage award after judgment. That decision was then applied to the present case to take away Appellant's "vested right".

This decision necessarily involved a determination whether the retroactive application of Section 290.140 was unconstitutional. The question was decided and it was decided adversely to the federal right. Therefore, the Supreme Court of the United States has jurisdiction under 28 U.S.C. Section 1257(2).

3. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because the Missouri Supreme Court has decided the issue of the constitutionality of the retroactive application of Section 290.140 and that particular decision was relied upon in this case.

The Supreme Court has continually denied jurisdiction on appeal when the federal question has not been presented to, relied upon, or decided by the highest court of the State. Charleston, supra. Simmerman v. Nebraska, 118 U.S. 54, 54 (1885), Hiawassee Power Co. v. Carolina-Tenn Co., 252 U.S. 341, 343 (1919), Onondaga Nation v. Thacher, 189 U.S. 306, 310 (1903). There is jurisdiction, however, from the highest court of a state in which a federal question was treated, properly

raised, passed upon, and contrary to the claim of constitutionality. Home Ins. Co. v. Dick, 281 U.S. 397, 407 (1930). Furthermore, there is jurisdiction if the question was presented or passed upon and necessary to the judgment. Wilson v. Cook, 327 U.S. 474, 480 (1960).

In reference to this case, the issue of the retroactive application of Section 290.140, in possible violation of the 14th Amendment due process clause, was specifically addressed in Vaughan, supra 660:

> "This Court concludes that the trial court erred in submitting a punitive damages instruction to the jury; plaintiff cannot recover punitive damages because he had no vested right to such damage at the time the 1982 statute became effective."[3]

This holding in Vaughan was then relied upon and basically was the deciding factor in the present case to take away Appellant's "vested right" in a punitive damage award after judgment.

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[3] Prior to Vaughan, case law held punitive damages were recoverable, where the cause of action accrued and suit was filed prior to the effective date of the amendment as Appellant's case was.

Therefore, the Missouri Supreme Court has been presented with the specific issues present in this case; it has held that the reversal of all prior precedents to retroactively apply Section 290.140 is constitutional. That holding, was then relied upon and was the necessary controlling factor in the outcome of the present case. As a result, the Supreme Court of the United States clearly has jurisdiction under 28 U.S.C. Section 1257(2).

CONCLUSION

For the foregoing reasons, Appellant Clay W. Dippel respectfully urges this Court to deny Appellee's Motion to Dismiss for lack of jurisdiction, and also to deny Appellee's Motion to Dismiss for want of a substantial federal question for reasons stated in Appellant's jurisdictional statement.

Respectfully submitted,

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